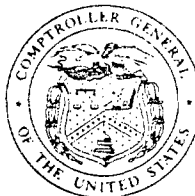


**DECISION**



13334 PLM-1 ms. Kelley  
**THE COMPTROLLER GENERAL  
OF THE UNITED STATES**  
WASHINGTON, D. C. 20548

FILE: B-193894

DATE: April 2, 1980

MATTER OF: Frank Fucile, Jr. - Claim for Retroactive  
Promotion and Backpay

AG-00002  
DLG-04284

DIGEST: Employee's claim for retroactive promotion and backpay is disallowed since employee was required to have security clearance before promotion. Although critical-sensitive security clearance for employee was not obtained prior to his selection for promotion as it should have been, the delay in obtaining clearance was made by security officer, not by appointing officer, and does not justify retroactive promotion.

The issue in this case is whether an agency's failure to obtain a critical-sensitive security clearance for an employee prior to his selection for promotion is an administrative error which permits a retroactive promotion for the employee with backpay.

Mr. Frank Fucile, Jr., a Consumer Safety Officer of the Food and Drug Administration (FDA), Chicago District Office, Department of Health, Education, and Welfare (HEW), appeals the disallowance by our Claims Division of his claim for a retroactive promotion and backpay. Mr. Fucile was selected for promotion from GS-11 to GS-12 on June 27, 1977. However, his promotion was delayed until September 25, 1977, because he did not have a critical-sensitive security clearance which was a requirement for promotion to GS-12. Mr. Fucile claims he is entitled to a retroactive promotion and backpay because the FDA had a policy of requesting clearances for all GS-11 employees, who did not have such clearances, in order to prevent delays in processing promotions to GS-12 positions. His claim is representative of seven similar claims.

The record shows that the FDA determined in April 1974 that Consumer Safety Officer positions, GS-12 or higher, should be designated critical-sensitive. At the same time it was determined that GS-11 positions would not be critical-sensitive but that clearances would be obtained for the occupants of such positions to prevent delays in processing their promotions when they were selected for GS-12 positions. Initiation of clearances for GS-11 employees was to be made in July 1975 and at periodic times thereafter.

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In this connection the record shows that a full field investigation of Mr. Fucile was requested by the Director, Chicago District, FDA, in a memorandum to the Security Representative, FDA, on February 2, 1977. However, Mr. Fucile's clearance had not been obtained when he was selected for promotion on June 27, 1977. The FDA admits that it failed to obtain timely clearances for Mr. Fucile and other Chicago District employees, but denied his claim on the ground that the failure was not an administrative error which permitted a retroactive promotion. The agency stated that the "error was the responsibility of the Agency and not that of the appointing official." Mr. Fucile appeals the subsequent disallowance of his claim by our Claims Division on the grounds that he was selected by a rated promotion panel and the HEW Regional Personnel Officer, who serves as the appointing official, performs strictly a clerical function in processing promotions as indicated to him by the FDA selecting official.

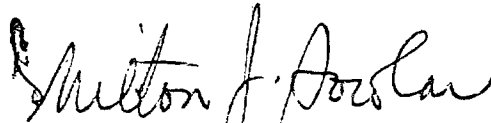
We have made a distinction between an error or omission which occurs before the approval of a promotion and an error or omission made after the approval of a promotion. The rationale for drawing this distinction is that the individual with authority to approve promotion requests also has the authority not to approve any such request unless his exercise of disapproval authority is otherwise constrained by statute or by mandatory administrative policy or regulation. Where the error or omission occurs before the appointing official has an opportunity to exercise his discretion to approve or disapprove a request for promotion, the administrative intent to promote at any specific time cannot be determined except by an after-the-fact statement of the appointing official as to what would have been his determination. On the other hand when he exercises his authority by approving the promotion request, all that remains to effect the promotion is a series of ministerial or clerical acts. John Cahill, 58 Comp. Gen. 59, 61 (1978).

In the instant case the following procedure applied. After a vacancy announcement is made an FDA selection panel selects the requisite number of applicants for promotion. The FDA District Director forwards the names of those selected for promotion to the HEW Regional Personnel Officer by means of a Request for Personnel Action (SF-52). The HEW Regional Personnel Officer is the authorized appointing official. Under the department's procedures, the Regional Personnel Officer was required to determine that all clearances were

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obtained before he could approve an employee's promotion. As stated above, it was FDA's policy not to promote an employee to a GS-12 Consumer Safety Officer position if he did not have a critical-sensitive security clearance. Therefore, the HEW Regional Personnel Officer acted properly in not effecting Mr. Fucile's promotion until the necessary security clearance had been obtained. Moreover, since the Director, Chicago Region, FDA, had requested the Security Representative, FDA, to obtain the necessary clearance, any delay in obtaining the clearance is attributable to FDA, not the HEW Regional Personnel Officer, and cannot be considered to be an administrative error on the appointing officer's part that would justify a retroactive promotion under our decision cited above. L

In view of the above the disallowance of Mr. Fucile's claim by our Claims Division must be sustained.



For The Comptroller General  
of the United States